VOL 5 OCTOBER 1898 No 5

CASE & COMMENT

MONTHLY

Per year 50 cents Per number 5 cents

Entered at the postoffice at Rochester N Y as second class matter by
THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY

Walter H. Sanborn

PORTRAIT SUPPLEMENT. — "CASE AND COMMENT."
THE LAWYERS CO-OPERATIVE PUBLISHING CO.,
ROCHESTER, N. Y.
NEW YORK:
57 BROADWAY.
CHICAGO:
RAND-MCNALLY BLDG.

Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED

LEGAL NEWS NOTES AND FACETIÆ

VOL. 5 — OCTOBER, 1898. — NO. 5

CASE AND COMMENT

Monthly. Subscription, 50 cents per annum postpaid. Single numbers, 5 cents.

THE LAWYERS' CO-OPERATIVE PUB. CO.,
Rochester, N. Y.

NEW YORK, 177 Broadway. CHICAGO, Rand-McNally Bldg.

Entered at postoffice at Rochester, N. Y., as second-class mail matter.

Walter H. Sanborn.

Walter H. Sanborn, judge of the United States circuit court and of the circuit court of appeals for the eighth judicial circuit, was born October 19, 1845, in Epsom, New Hampshire, at the ancestral homestead on Sanborn Hill, which had been occupied by the family since 1752. Both lines of his ancestry lead back directly to soldiers of the Revolution. His great grandfather on his father's side was not only a soldier, but was also town clerk of Epsom during the revolutionary period, and was for several years selectman of the town. His grandfather and his father were both men of much prominence, and each in turn served the people as selectman, member of the state house of representatives, and also in the state senate.

Judge Sanborn commenced to teach school when sixteen years of age. He entered Dartmouth college in 1863, but taught school each winter during his college course. Yet he led his class for the four years of his course, and was graduated with the highest honors as valedictorian in June, 1867. After several years' service as principal of the high school at Milford, he went, in February, 1868, to St. Paul, Minnesota, where one year later he was admitted to the bar in the supreme court of the state. He formed a partnership with his uncle, General John B. Sanborn, which continued until he was appointed judge of the circuit court of the United States in 1892. His practice at the bar was remarkably great. He was one of the attorneys in more than 4,400 cases, many of which were of very great importance. In the bar associations of his city and state, in masonic organizations, and in municipal and political affairs, as well as in the courts, he was a prominent and influential man. As an orator on public occasions his services were in much demand.

Judge Sanborn was married on November 10, 1874, to Miss Emily Bruce of Milford, New Hampshire, and they have two sons and two daughters. The degree of LL. D. was conferred upon him by his Alma Mater in June, 1893. In the few years that Judge Sanborn has been on the bench he has demonstrated his judicial ability in the disposal of many cases of the greatest magnitude and importance. One of the earliest was the Omaha Bridge Case, 10 U. S. App. 98, 2 C. C. A. 174, 51 Fed. Rep. 309, and one of the later is United States v. Trans-Missouri Association, 19 U. S. App. 36, which is one of the great cases of recent years. Although his decision in the latter case has been reversed by a vote of 5 to 4 in the Supreme Court, it represents the views of a majority of all the Federal judges who passed on the question.

The Retirement of John Bull.

A modest suggestion for preventing any future quarrels between this country and Great Britain is put forth by Francis Wayland Glen, who describes himself as an ex-member of the Canadian Parliament, and the soundness of whose judgment is indicated by his quoting from Goldwin Smith as "the

greatest of living Englishmen." The suggestion is simply this: That Great Britain shall "retire voluntarily from this hemisphere." While the retirement is of course to be voluntary, he would apply some pressure. He declares that "no reciprocity treaty with Canada should be negotiated which will not lead to the peaceful withdrawal of Great Britain from this hemisphere and the political union of the United States and British North America." So modest and reasonable a suggestion will, of course, be accepted by John Bull, who has a retiring disposition.

Judicial Immutability.

The unchangeableness of a legal doctrine once adopted by the House of Lords is clearly and definitely declared in London Street Tramways Co. v. The London County Council [1898] A. C. 375. It is declared that a decision on a question of law is conclusive and binding on the House in subsequent cases, and that, if erroneous, it can be set aside only by an act of Parliament. Lord Halsbury speaks of the principle as having been "established now for some centuries," but this, says Sir Frederick Pollock, in the "Law Quarterly Review," "is, so far as we know, not only unproved, but against the evidence."

Such absolute immutability is sometimes thought to be the true rule for all courts. But if such a rule had been followed, our law would probably have been cumbered with many anomalies and indefensible doctrines that have long been abandoned. The petrifying and the permanent embodiment in our law of all judicial blunders seem too high a price to pay for the luxury of believing in judicial infallibility.

Angry at the Truth.

Those who hold their own opinions more sacred than truth sometimes get angry when shown that they have been in error. Our article pointing out that it is false to say that the liquor traffic was originally unlawful and has been "legalized" has called out some responses that are moral curiosities. One of them was referred to in our July number. Another came on a postal card, and reads as follows: "If Case and Comment has no better mission than bolstering up the liquor traffic of America, the sooner it shuts up shop the better for humanity. It should be aware that nine tenths of all crime, and about that proportion of earth's hell generally, is caused by this infamous business, and have the good sense, if it do not attack, to keep still or help the people throttle, the assassin." Our assailant does not claim that what Case and Comment has said is not true. Indeed, the assertion that the liquor traffic was illegal until legalized by statute is so palpably, glaringly, and incontestibly false that no honest man can make it after he has intelligently examined the question. Yet this assertion has been very commonly made by men who ought to know better, and has been believed by a great many people. Solely because Case and Comment exposes a falsehood it is accused of "bolstering up the liquor traffic." Yet the most effectual way to bolster up that traffic is to identify the temperance cause with a theory that well-informed people know to be false. If all the leaders of the temperance cause can be compelled to abandon this absurd untruth they will be so much nearer to the possibility of uniting with their forces the great multitude of intelligent and earnest men whom they have hitherto alienated.

Marriage of Insane Person.

The common-law doctrine that the marriage of an idiot or lunatic was valid is shown by the note to Sims v. Sims (N. C.) 40 L. R. A. 737, to be entirely abandoned by the courts in modern times. The universal rule now is that mental capacity to consent is an absolute essential of a valid marriage. This rule, however, does not preclude marriage of an insane person during a lucid interval. The degree of mental incapacity which will prevent a valid marriage is not definitely established, but the majority of the cases say that the test is the capacity to know the nature of the act, and some cases hold that a less degree of mental capacity may be required than in case of other contracts. When fraud intervenes the marriage of a person of somewhat weak mind may be held void in cases where the mental capacity might be sufficient except for the fraud.

The procedure required to obtain relief from an invalid marriage because of the incapacity of one of the parties differs somewhat in different states. In Georgia, for instance, suit may be brought for a divorce on that ground, and no proceeding to declare the marriage a nullity is recognized. But the common remedy is by an action to declare the marriage a nullity.

Whether such a marriage is absolutely void, or merely voidable, is an interesting question. There is much authority for holding that it is absolutely void, and may be attacked collaterally in any court wherein the validity of the marriage comes in question, as in suit for dower, for distribution, or for a widow's support after the death of her husband. But these authorities also declare that for the sake of the good order of society, as well as the quiet and relief of the party, the nullity of the marriage should be declared by the decision of some court of competent jurisdiction, and there are some authorities which deny that the validity of the marriage on such a ground can be inquired into collaterally.

The ratification of a marriage by a lunatic after he has regained his reason is generally held sufficient to make it valid. The general tendency of the courts on all these questions is to protect the rights of children or of other innocent persons which have been acquired under such a marriage. And there are also some statutes which provide for the legitimacy of the children of such a marriage notwithstanding its annulment.

Defects of the Bankruptcy Law.

"A bundle of inconsistencies, contradictions, inadequacies, and shortcomings, a legislative misfit," is what Henry Wollman, in an address before the Credit Men's Association of Kansas City, calls the new bankruptcy law. He says that it is "a weak bankrupt act for creditors. What it appears to give to them with the right hand it attempts to take from them with the left. Whenever the original framers put in a good clause some enemy slipped in a 'proviso' to sap the life out of it." What he regards as the worst feature of the bill is the provision that the trustees shall bring actions against adverse claimants only in the courts where the bankrupt might have brought them, if bankruptcy proceedings had not been instituted. This provision seems to preclude a suit in a Federal court by a trustee to attack alleged unlawful preferences except when the bankrupt and the preferred creditor reside in different states or some Federal question is involved that would have enabled the bankrupt himself to bring an action in a Federal court against the creditor. The natural inference to be drawn from this provision is that the particular Federal question which arises under the bankrupt law itself respecting the validity of the preference will not be sufficient. Indeed, the purpose of the provision seems to be to deny Federal jurisdiction on that ground. Yet it may be somewhat unsafe to say what is the effect of this provision until the courts have passed upon it. Concerning the probable effect of this provision, Mr. Wollman says: "If the Federal officials are to be driven into local state courts to try all the contests with local banks and relatives as to whether a conveyance is a preference under the terms of this bankrupt act, before juries composed of the neighbors of the preferred bank or mother-in law, you might as well shut up shop in your efforts to set aside preferences, and a bankruptcy proceeding then would absolutely amount to nothing except a quick proceeding for a man to get his discharge. . . . But I believe the Federal courts will in every case where they assume control of an estate in bankruptcy be able to find a way under this very bill of asserting their powers to effectually decide whether a conveyance which is attacked is a preference, and whether it should be set aside."

Another "proviso" which he calls a "masked battery threatening the life of all the anti-preferential clauses," is the provision that a preference within four months before filing the petition shall be avoidable if the person receiving it "shall have reasonable cause to believe" it was intended as a preference. He says: "The test should be, Was it in fact a preference, and did it operate as a preference? The knowledge or lack of knowledge of the man who received it certainly cannot alter the situation. Of course, the banker who receives the preference never has or will have the slightest idea his customer was insolvent or that anything was wrong with him. Under those circumstances he will distance Dickens' fat boy in saying and proving, 'I don't know nothing.' That clause will make creditors perspire blood."

Newspaper Libel.

Impudence can go no further than many newspaper men go in their demand for legal protection in publishing libels. A recent address by Frank Bushwick of San Antonio, Texas, on this subject, is in most respects very reasonable. But, looking at the matter from the interest of the newspapers, he also unites in their unreasonable demand that "an intention to do harm" must be proved in order to recover anything more than actual damages

specifically proved. This, of course, means pecuniary damages only. It amounts in reality to an entire exemption from responsibility for one of those outrageous libels which may ruin a reputation, break a heart, and blast a life, but cause no provable pecuniary loss. It would, for instance, sweep away the entire remedy from a blameless woman cruelly wronged by recklessly printing some lying gossip which fiends or fools had started about her.

"Full correction and apology" is often averred by newspaper men to be a sufficient remedy for unintentional wrong. It is difficult to believe in their good faith on this point. Every newspaper man knows that a scandal or sensational item will be copied into unnumbered newspapers that will never copy the correction.

A great modern newspaper is a mighty engine with almost unlimited capacity for injuring those who get in its way. Unless the highest honor and the most chivalrous regard for the rights of individuals control its entire force of editors and reporters, this powerful machine will do reckless, if not malicious, wrong to many people. It can ride over their reputations like a juggernaut and leave them crushed and helpless, if the law allows no recovery except the pitiful farce of proved pecuniary damages.

Honorable newspaper men are often so biased and warped by their selfish interest that they substantially demand the right to do heedless outrage on innocent persons for the sake of making their own business profitable. The power of the press is such that it coerces cowardly legislators and actually secures legislation to protect it from any real responsibility for the cruelest wrongs. The man who feels a stain like a wound, or the woman to whom a breath of suspicion is a stab that kills, may be unspeakably disgraced and literally heartbroken by the rash publication of a baseless rumor which is read next day by millions of people, yet the newspaper that has done the wrong offers the dastardly defense that it had no malice toward the victim, but did it only as a matter of business, to get a "scoop" on its contemporaries.

Right to Pollute Streams.

It has been usually understood to be well-settled law that no one has the right to pollute a stream to the detriment of riparian proprietors. Almost everywhere, indeed, this is unquestionably the rule. But there are a few cases which modify it. The discharge of sewage into a stream by a municipality is usually held, as in Chapman v. Rochester, 110 N. Y. 273, 1 L. R. A. 296, to be subject to the same liability that exists in the case of the pollution of a stream by a private person. In Massachusetts, however, it has been held that a municipal corporation is not liable for casting sewage into the stream by a properly constructed system of sewerage, unless it is made so by statute. Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592. But a later case holds that the use of the stream for such purpose must not be made a nuisance unless it is absolutely necessary, and that the city may be liable if it is negligent in the manner of constructing its sewerage system or in failing to purify the sewage before it enters the stream, provided this can be done at reasonable expense. Morse v. Worcester, 139 Mass. 389. The most striking divergence from the ordinary doctrine is that made in Richmond v. Test, 18 Ind. App. 482. In this case the Indiana appellate court holds that a municipal corporation is not liable in the absence of malice for injuries caused by casting sewage into a stream when it has not failed to exercise due care or skill in constructing the sewers or in operating and maintaining them. The court says: "The building of the sewers was a lawful act, and they were constructed where public necessity required they should be." This decision is based chiefly on the Massachusetts cases above cited, and on the decision of the supreme court of Indiana in Barnard v. Shirley (Ind.) 24 L. R. A. 568. That case was a novel one. It held that the owner of a sanitarium was not liable for the damages caused to the riparian proprietors on a stream by casting into it waters procured from an artesian well and used to bathe patients in the sanitarium, including those who were afflicted with syphilis or other infectious diseases. This decision is followed as the law of the case on a second appeal, although the record in the later case presented a less serious pollution of the stream. This seems to be the first case respecting injury by the disposal of the waters from an artesian well.

The use of streams to carry off the sewage of a city would substantially destroy the value of riparian rights below large cities, and would cause in many cases a serious menace to health. The public welfare certainly demands that some other mode of disposal of

sewage shall be adopted as population grows dense. It would be unfortunate if the courts generally should uphold the right of a city to use a stream for a sewer.

The Common-Law Doctrine of Navigable Waters.

Tracing the development of an erroneous doctrine of law is always interesting, although at the same time it is likely to be exasperating. In 1805, in the case of Palmer v. Mulligan, 3 Caines, 318, Chief Justice Kent stated that a river was not navigable in the common-law sense of the term at a place where the tide did not ebb and flow. This doctrine soon afterwards appeared in Kent's Commentaries and in Angell on Watercourses, and has been generally recognized by the courts of this country without any attempt to investigate the truth or falsity of the statement. But while the statement was accepted, its doctrine as to navigability was emphatically repudiated, for, in the cases as they have occurred in great numbers will be found Kent's statement as a premise, followed by the phrase, "but such is not the law in this country." That it is not the law in this country is true, and, so far as the reported cases show, it never was the law anywhere before Judge Kent stated it as law. Since then not only have the American cases accepted the statement, but in Murphy v. Ryan, Ir. Rep. 2 C. L. 143, the doctrine is recognized with reference for authority to Kent's Commentaries, and finally in England, in the case of Ilchester v. Raishley, 61 L. T. N. S. 477, it is also recognized with reference for authority to Murphy v. Ryan. When the law before Kent's time is examined, his statement will be found to depend for support on the very brief reports of two or three cases which decided that there was a common right of fishing in navigable waters, of which Warren v. Matthews, 6 Mod. 73, is the leading one. The full report of that case is as follows: "Every subject of common right may fish with lawful nets, etc., in a navigable river as well as in the sea, and the King's grant cannot bar them thereof; but the Crown only has a right to royal fish, and that the King only may grant." In Lord Fitzwalter's Case, 1 Mod. 105, Lord Hale had said that the right of fishing was common to all in rivers that flow and reflow, and in the arms of the sea. Reading one case in the light of the other, it evidently was assumed that navigability, and flow and reflow of the tide were synonymous. But the question of what was navigable water was not involved in either case. So that, to use these cases for authority on the point that navigability depended on ebb and flow of the tide, involves, first the assumption that the language of the judge was reported accurately, which is extremely doubtful, because in nearly every other case the word "navigable" is limited by the words, "where the tide ebbs and flows;" second, the adoption as law of something which can be regarded as nothing higher than implied *dictum*. Kent cites the Royal Fishery in the River Banne, Davies, 149; Carter v. Murcot, 4 Burr. 2162, and King v. Wharton, 12 Mod. 510. The Banne Case involved the right to a fishery in tide water in the River Banne, and the court held that navigable rivers so far as the tide ebbed and flowed in them belonged to the King, and that, therefore, the fishery was his. There is nothing in the case to show that navigability ceased with the ebb and flow of the tide. In fact the implication is the other way. Carter v. Murcot held that a prescriptive right of fishery might be acquired in a river where the tide ebbed and flowed. And King v. Wharton decided that if a river runs between the land of two persons each is the owner of the part of the river which is next his land. Hale, in De Jure Maris, does not seem to have understood that navigability was limited by the ebb and flow of the tide, for he treats all navigable rivers, as well fresh as salt, as public highways. Neither Woolrych nor Phear limits navigability to tide water. In Williams v. Wilcox, 8 Ad. & El. 336, Orr Ewing v. Colquhoun, L. R. 2 App. Cas. 838, and Hind v. Mansfield, Noy, 103, navigability is recognized as extending above tide water, while in Rex v. Montague, 4 B. & C. 590, Miles v. Rose, 5 Taunt. 706, and Lynn v. Turner, 1 Cowp. 86, tide water is recognized as being non-navigable; Lord Mansfield saying in Lynn v. Turner, *ex facto oritur jus*. Moreover, only a few years before Kent made his declaration of the law, the court had, in the case of Pierse v. Fauconberg, Burr. 292, left it to the jury to say whether or not the Tees was navigable above Yarum bridge, without making the question depend in any way upon the tide. Since ebb and flow of the tide is not, and never has been, the test of navigability in this country, and it seems so doubtful, to say the least, that it ever was at common law, no further attention should be paid to this alleged test. Such course would eliminate a great many useless words from

the opinions of the courts. The chief reason for its retention seems to be to aid in determining the ownership of the soil under the water, but since that never depended on the question of navigability, but on the question of the ebb and flow of the tide, the retention of it cannot be valuable for that purpose. The King's ownership of the sea and the soil under it was early established, and the sea was distinguished from other water by the ebb and flow of the tide, so that the King's title to the soil extended so far as the tide ebbed and flowed. Above that it seems to have been by common consent conceded to be in the adjacent owner.

The Supreme Court and the Constitution.

A clear, sane, and convincing demonstration of the inestimable value of our national Supreme Court was made by Senator George F. Hoar, of Massachusetts, before the Virginia Bar Association, at its session in July, and published in the August and September issues of "The American Lawyer." Many of the hasty and passionate utterances against that court in recent years would not have been made if their authors had first read this calm, fair, and statesmanlike address.

Senator Hoar takes up in detail the cases in which the Supreme Court has held acts of Congress unconstitutional, and makes a remarkable showing for the independence and nonpartisan temper of the court. He refers to the reconstruction acts of Congress, which were held unconstitutional, and says: "In each of these cases it is to be noted the court held unconstitutional the legislation of the political party to which a majority of its members belonged—the party to which that majority had owed its appointment. In that way the political policy desired by a majority of the people lately victorious in a great civil conflict was frustrated and baffled. The self-government of states lately engaged in an armed conflict with the government of the United States was preserved;" and again: "I think, therefore, that I may confidently appeal to my audience to agree with me in saying that the great powers given by the Constitution of the United States to the Supreme Court have been in favor of liberty and of popular self-government, and not in restraint of either."

In respect to the Income Tax Case, which is the only one which he thinks his audience would dissent from, he asks if "any single state would have adopted the national Constitution if it had been believed that the central power would ever be permitted to invade this domain for the purposes of taxation." But he insists that even if the court was wrong in this decision it has in general been in accord with the best opinion of the country, and with the best opinion of Virginia.

All know the way that popular waves of passion sweep over Congress. It justifies his conclusion that "the court is the shield of the minority and the shield of the citizen; the maintenance of its authority is in the last resort to prevent us from becoming, instead of a constitutional government, a government of a pure unchecked majority, and going surely and speedily the way of the empires and the republics of the past."

The fear that the court may thwart the will of the people is disposed of by pointing out the merely temporary effect of any judicial check to a popular movement. He said, "If we look at this judicial power, not as it bears upon immediate and temporary and fleeting conditions, but as it affects the steady, permanent, and slow growth of the country, we shall find that the effect of the declaration by the court that an attempted exercise of the legislative or executive power is a violation of our written Constitution is only to require pause, reconsideration, slowness of procedure in accomplishing what the popular will shall desire. The permanent settled will, the sober thought of a great people, will make its way in the end, either by changing the Constitution or by changing the construction."

Against rash measures for curing political wrongs or bettering civic conditions, he wisely says: "God forbid that anything should so change the temper of the American people as to destroy that healthy and eager discontent, alive to existing evil, constantly yearning for an ideal perfection always to be approached, if never to be attained. That is the secret of greatness and of glory. But we need to be taught the lesson of which the American lawyer is the best possible teacher—that everything which is permanent is of slow growth. The mushroom which grows in the night perishes in a day, while the oak slowly adds ring to ring through its centuries of life. I hope that our people will be taught this lesson by the American bar, especially in dealing with their Constitution."

Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

Book 40, Part 6, and Book 41, Part 1.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.

The part containing any note indexed will be sent with CASE AND COMMENT for one year for $1.

Among the New Decisions.

Bicycles.

That a bicycle is not a "tool" or "apparatus" that belongs to the "trade" or "profession" of an architect and building superintendent is decided in Smith *v.* Horton (Tex. Civ. App.) 46 S. W. 400, although it is deemed a useful and convenient mode of locomotion.

Bills and Notes.

An unrestricted guaranty of payment indorsed on a negotiable instrument is held, in Commercial Bank *v.* Cheshire Provident Inst. (Kan.) 41 L. R. A. 175, to be negotiable, and it is also held that it passes with the title to the instrument.

Carriers.

A person holding a mileage ticket, who, with intent to board a train standing on a siding near a station, without going to the station, attempts to cross the main line, is held, in Southern R. Co. *v.* Smith (C. C. App. 5th C.) 40 L. R. A. 746, to be not a passenger to whom the carrier owes extraordinary care or diligence, but only one of the general public entitled to ordinary care, if he has done nothing to notify any of the officers or agents of the carrier that he is a prospective passenger.

Contracts.

A statute reducing the lien or charge of a judgment against the estate or person of a judgment debtor and prohibiting the renewal thereof for more than one year after the act takes effect is held, in Bettman v. Cowley (Wash.) 40 L. R. A. 815, to be an unconstitutional impairment of the obligation of contracts so far as it applies to those made before the statute was passed.

Corporations.

A promoter who transfers to a corporation land purchased by him before the corporation was formed is held, in Milwaukee Cold Storage Co. v. Dexter (Wis.) 40 L. R. A. 837, to be not subject to any liability to the corporation for the amount received by him in excess of what he paid, if he made no misrepresentations or false statements about the matter, and all the subscribers had opportunity to ascertain the condition and value of the land and knew the price charged, although he did not disclose to them the amount which he paid.

Death.

The "heirs" who are entitled to a right of action for the death of a person under 2 Hill's (Wash.) Code, § 138, are held, in Noble v. Seattle (Wash.) 40 L. R. A. 822, to include the widow and children only, and not to include the parents of the deceased.

Easements.

The easement or right in respect to light and air from an open space annexed to a mansion-house estate, created by will by providing that the establishment shall continue as much as possible unchanged is held, in Baker v. Willard (Mass.) 40 L. R. A. 754, not to amount to a general right to have the space kept open for the whole extent of the court, but only to an ordinary easement of light and air for existing buildings, where there was no communication or entrance to the court from the mansion-house estate and its only use of the court was for light and air and for a drain.

Ejectment.

On a second trial in an ejectment suit taken by the defeated party as a matter of right under the terms of a statute allowing it, it is held, in Slauson v. Goodrich Transp. Co. (Wis.) 40 L. R. A. 825, that rulings upon the admissibility of evidence made on the former trial have no binding force.

Election Districts.

One exercise of the legislative power to make an apportionment of the state based on the last Federal census under Ill. Const. art. 4, § 6, providing that the general assembly shall apportion the state every ten years by dividing the population as ascertained by the Federal census, is held, in People, Mooney, v. Hutchinson (Ill.) 40 L. R. A. 770, to exhaust the power and to preclude a change of the apportionment until the conditions provided for in the Constitution shall again exist.

Electrical Uses.

The doctrine that the placing of electric wires known to be dangerous at a place where others are lawfully entitled to be constitutes negligence is applied, in Perham v. Portland General Elec. Co. (Or.) 40 L. R. A. 799, to wires strung over a bridge where workmen in repairing the bridge come in contact with them; and it is also held that the apparent perfect insulation of the wires amounted to an invitation to risk contact with them, when the wires are placed where persons in performing their duties may come in contact with them.

The death of a person by contact with an abandoned telephone wire charged with electricity by crossing an electric-light wire is held, in Mooney v. Luzerne Borough (Pa.) 40 L. R. A. 811, to raise a question for the jury, where the wire, after it had been unused for several months and had sagged so as to interfere with public travel, was cut by a member of the borough council and wrapped around a post within easy distance of pedestrians, and with one end resting on the ground or in the water.

Homesteads.

A woman who abandons her husband and lives apart from him in another state, even though in adultery, is held, in Duffy v. Harris (Ark.) 40 L. R. A. 750, not to forfeit thereby her right in his estate under Ark. Const. 1874, art. 9, § 6, providing that, if the owner of a homestead died leaving a widow, it shall be exempt and she shall have the rents and profits during her natural life.

Husband and Wife.

Marriage with a person who has been found by appropriate proceedings to be mentally imbecile is held, in Sims v. Sims (N. C.) 40 L. R. A. 737, to be absolutely void *ab initio* and subject to be so declared by the court at any time. It is also held that a marriage void on account of lunacy cannot be cured merely by cohabitation after restoration.

A tort committed upon a wife by her husband while they are living together as husband and wife is held, in Bandfield v. Bandfield (Mich.) 40 L. R. A. 757, to give her no right of action in the absence of statutory provisions therefor.

Indians.

Game killed on an Indian reservation by a tribal Indian and transported by wagon to the nearest railway station off the reservation and there delivered to a carrier to be shipped out of the state is held, in Selkirk v. Stevens (Minn.) 40 L. R. A. 759, to be subject to the game laws of the state.

Insurance.

A "standard guaranty to maintain 80 per cent insurance," stamped on the face of a policy of fire insurance, is held, in Cutler v. Royal Ins. Co. (Conn.) 41 L. R. A. 159, ineffectual to supersede a provision that the policy shall be void in case of other insurance,—at least when the policy itself is for more than 80 per cent of the value of the property.

Notice that an unearned premium will be restored, and holding the amount subject to the call of the insured, is held, in Tisdell v. New Hampshire Fire Ins. Co. (N. Y.) 40 L. R. A. 765, insufficient to satisfy the obligation of an insurer to return the premium as a condition of canceling the policy.

Notice of an accident causing death, given to an insurance company twenty-nine days after knowledge of the facts was obtained, is held, in Foster v. Fidelity & C. Co. (Wis.) 40 L. R. A. 833, to be too late to be "immediate" within the meaning of the policy.

Insurance on merchandise kept for an illegal business, such as a stock of drugs and liquors kept by a dealer who did not have the permit required by law to sell them, is upheld in Erb v. German-American Ins. Co. (Iowa) 40 L. R. A. 845, against the claim that it was void as against public policy.

Limitation of Actions.

A foreign corporation which has officers and agents in the state on whom service of process can be made at any time is held, in Turcott v. Yazoo & M. V. R. Co. (Tenn.) 40 L. R. A. 768, not to be "out of the state" within the meaning of the statute of limitations.

Master and Servant.

Notice to an employer that one who is employed to manage a brake controlling the passenger cage connected with a mine has become incompetent is held, in Walkowski v. Penokee & G. Consol. Mines (Mich.) 41 L. R. A. 33, not to be implied from the fact that the engineer thought he ran the cage too fast, if there was nothing to show that the information has reached the employer.

The right of a servant to rely on the promise of his master to repair defects in the place where the labor is to be performed is held, in Illinois Steel Co. v. Mann (Ill.) 40 L. R. A. 781, to exist for so long only as is reasonably necessary to make the repairs, and after that period the servant is held to have waived the defects and to have assumed the additional risk.

The duty of an operator or agent of a coal mine to employ a competent mine boss being imposed by statute, is held, in Williams v. Thacker Coal & C. Co. (W. Va.) 40 L. R. A. 812, to be fully performed by the employment of such a mine boss, and for the latter's negligence the operator or agent is held not to be liable.

Mortgages.

The right of a mortgagee to enforce the payment of the mortgage debt as against the grantee of the mortgagor who has assumed its payment is held, in Knapp v. Connecticut Mutual L. Ins. Co. (C. C. App. 8th C.) 40 L. R. A. 861, to rest, not upon any contract which the mortgagee can enforce at law, but upon the fact that the grantee is primarily liable, while the mortgagor is surety, so that he may be subrogated to the rights of the mortgagor and by suit in equity compel the grantee to keep his engagement. By suing the grantee the mortgagee does not adopt the mortgagor's covenants so as to prevent foreclosure of the mortgage for the balance of the debt.

Municipal Corporations.

The right of a city to accept a grant from another state to operate a toll road beyond its own limits and the limits of its own state, or to be held liable for defects in such road if operated by it, is denied in Becker *v.* La Crosse (Wis.) 40 L. R. A. 829, although such toll road is made to connect with a toll bridge which the city has built under proper authority.

Publication.

Publication of a delinquent tax list in the English language but in a newspaper which is otherwise printed in the German language is held not to be sufficient in State, Goebel, *v.* Chamberlain (Wis.) 40 L. R. A. 843, when the statute provides in general terms for publication in a newspaper printed in the county, as the English language is the language of the country to be used in all official proceedings, in the absence of statute authority to the contrary.

Trademarks.

The right of the owners of mills in Minneapolis, Minnesota, to an injunction against the use of the names "Minneapolis" and "Minnesota" on flour of a lower grade, made in another state from wheat of a different grade than that manufactured in Minneapolis, is sustained in Pillsbury-Washburn Flour Mills Co. *v.* Eagle (C. C. App. 7th C.) 41 L. R. A. 162, on the ground that the Minneapolis millers had established a high reputation for flour bearing those names and used therefor a superior quality of wheat and the same process and the same kind of machinery, subjecting their product to the same kind of inspection.

Unborn Children.

Possible afterborn children are held, in Gavin *v.* Curtin (Ill.) 40 L. R. A. 776, to be bound by a decree directing the sale of property to preserve the interest of remaindermen under a devise of land from loss for nonpayment of taxes, where the parties in being and before the court have the same incentive to accomplish the same purpose as would move the parties not in *esse* if they were in being.

Voters and Elections.

The purser of a steamer who lives on it is held, in Jones *v.* Skinner (Md.) 40 L. R. A. 752, to be unable to acquire by such residence the right to vote in a district at which the steamer ties up at her home port, where he had formerly acquired a residence in another part of the city. Substantially the same rule is enforced in Howard *v.* Skinner (Md.) 40 L. R. A. 753, in the case of a clerk who slept in a room on the boat and who had no other room or place to live, and who was unmarried.

Waters.

The drainage of seepage or surplus water from irrigated lands into a canal from which water is supplied for domestic purposes as well as for irrigation is held, in North Point Consol. Irrig. Co. *v.* Utah & Salt Lake Canal Co. (Utah) 40 L. R. A. 851, to be wrongful, when the drainage renders the waters unfit either for domestic or for irrigation purposes, and to constitute a nuisance, although a prescriptive right to do so might be acquired by twenty years' uninterrupted use.

Recent Articles in Law Journals and Reviews.

"Right to Terminate a Hiring the Duration of Which is not Expressly Provided for by the Parties."—34 Canada Law Journal, 587.

"Interpreting the Spirit of a Contract."—105 Law Times, 331.

"Jurisdiction in Suits for Judicial Separation."—105 Law Times, 308.

"The English, French, and Belgian Bars."—105 Law Times, 314.

"Trial by Jury."—6 American Lawyer, 325.

"Paris Courts, Lawyers, and Customs."—6 American Lawyer, 331.

"Delegation of Legislative Authority."—47 Central Law Journal, 251.

"The Most Ancient Law."—7 Yale Law Journal, 377.

"Federal Control of Hydraulic Mining."—7 Yale Law Journal, 385.

"The Evolution of Allodial Land Titles in Hawaii."—7 Yale Law Journal, 393.

"The Right of Shooting."—105 Law Times, 379.

"Pleading and Proof of Ordinances."—47 Central Law Journal, 233.

"Negligence; Independent Contractor."—47 Central Law Journal, 237.

New Books.

"Monopolies and Industrial Trusts." By Charles Fisk Beach. (Central Law Journal Co., St. Louis, Mo.) 1 Vol. $6.

"Contracts of Pledge." By Henry Denis. (F. F. Hansell & Bro., New Orleans, La.) 1 Vol. $6.

"Forms of Pleading." By Austin Abbott. Completed by C. C. Alden. (Baker, Voorhis & Co., New York.) 2 Vols. $6.50 each.

"Taxation for State Purposes in Pennsylvania." By Frank M. Eastman. (Kay & Bro., Philadelphia.) 1 Vol. $2.

"Choate's Digest of Florida Reports." Vol. 2. (F. H. Thomas Law Book Co., St. Louis, Mo.) $10.

"Digest of English Case Law." By John Mews. (Boston Book Co., Boston, Mass.) 16 Vols. $96.

The Humorous Side.

MISNOMER.—It is something of a shock to see Prof. Bigelow's excellent work on the Law of Fraud on Its Civil Side cited by a judge as "Big. Fraud." It's not that kind of a book.

HOW LAWYERS ARE LIKE LIES.—In a very witty address by Jesse Holdon before the Chicago Credit Men's Association (published in "The American Lawyer" for September), he said of lawyers: "Like the boy's version of the text about lying, they may be an abomination unto the Lord, but they are an ever present help in time of trouble, as all of you know by actual experience."

HIDDEN PEARLS.—One of the pearls sometimes cast before courts and then buried in the rubbish of old cases is preserved in 9 Utah Reports, p. 427. Respondent's brief says: "The purported statement of facts in appellant's brief has merely a bowing acquaintance with the evidence; it certainly can claim no undue familiarity. The ingenious gentleman who prepared it did not confine himself to a cold recital of the bare facts in the case. He embellishes and adorns it with the delightful flowers of his fancy. As a literary production it is unique. It cannot be classified. As a work of fiction it lacks interest; as a mere history it smacks too strongly of legend and fable." The reporter adds: (This beautiful exordium is inserted by the Reporter, because he feels a just pride that such gems of humor and artistic irony are not unknown in the musty records of the court.)

WHERE THE LAW IS.—An attorney writes: "The opinion of our supreme court in the case is not instructive, and was evidently written by a judge who wished to affirm a judgment clearly unsupported by both law and facts, but in our briefs you will find the law."

IN PURSUANCE OF THE CODE.—In an affidavit taken before a Mississippi justice of the peace, on which a conviction for assault and battery was sustained, the affiant declared that the accused "did wilfully assault and strike him with a deadly weapon, to wit, 'a tobacco box,' in pursuance of chapter 29 of the Annotated Code of 1892. Against the peace and dignity of the state of Mississippi."

A TEXAS DANIEL.—A justice of the peace in Texas, on the fourth trial of a petty but tenaciously fought case in which no appeal could be had, allowed the witnesses on cross-examination to suit themselves about answering questions. A witness would say, "I wont answer no such g— d— fool questions as that," and the justice, with similar emphasis, would say, "That's right." There was a fight between the attorneys because one of them tried to stem the rushing, roaring tide of the other's eloquence to the jury by calling him a liar. These amenities were apparently regarded as proper incidents of the trial, but on complaint made against the orator for "using loud and vociferous language in a public place, to wit, the court-house," he was convicted by the justice and fined $15. The justice seems to have a new version of Dr. Watts, which says: "Let lawyers delight to scrap and fight, for 'tis their nature to; but to yell like fury when addressing the jury, only imps of Satan will do."

U. B. D.—A young lawyer was one day making a plea before Lord Russell. It was late in the afternoon, the hour for adjournment was fast approaching, and the young barrister, anxious to finish before closing time, was hurrying along as best he could. Suddenly he spoke of 2 Q. B. D. Lord Russell interrupted him sharply. "You forget yourself, sir," he said sternly. "You forget yourself. That is no way to address this court." The tyro was profuse in apologies, and explained that he only meant to refer to 2 Queen's Bench Division of the Law Reports. But the chief justice refused to be appeased. "Why," he cried, "I might as well say to you, U. B. D." —*The Calfskin.*

One eye-witness is better than ten hearsays

And two months' use is worth ten months' advertising in proving that General Digest Annotated is the best digest published.

If it were not, we would perhaps ask for your money before sending it on approval. But we know that the General Digest is nearer perfect than any other; that in the light of modern digest methods it is perfect—the standard; that none other could be better; that none other is as good.

It answers fully the criteria of the American Bar Association Committee for the best digest, and is the only digest that does.

Ask yourself; are these *exclusive* features of advantage in a current digest—a perfectly uniform classification by law points, all the American and English cases, *all* citations official and unofficial, references to all new textbooks and legal articles in current periodicals, and typography which segregates your own state cases at a glance.

The General Digest Annotated alone has them, and it gives besides "*the last century's law without a cent of cost*" in progressive annotation. *We* might charge $300 or more extra for this, expanded into a lot of big books.

Vol 5 is just out and will be sent you on 60 days' approval. Test by comparison and actual use the features common to all digests, and note those peculiar to this. If you don't appreciate them you may return it without cost to yourself.

The Lawyers' Co-operative Publishing Company
Rochester New York

"Turn to the right, and go straight ahead"

A story is told of a little Scotch lad who when asked how far it was to a near by town (perhaps Drumtochty or Thrums) replied, "Gin you gang on as ye're heddit noo, mair than 25,000 miles, but gin you turn aboot and gang the nearest road, nae mair than twa."

Has it ever occurred to you that, in not using the Lawyers' Reports Annotated in the preparation of a case, you are on, if not the longest, certainly a very long and uncertain road to a decision in your favor?

A single note in L R A, answering a single definite question, is often the result of one to six months' unremitting work of a skilled editor with unequaled facilities at his command. It gives impartially the cases on all sides. You may have just this point to brief. Given equal skill and facilities it would take you as long as it did him to look up this material for your brief. In L R A it's done for you.

R W Winston, of Durham N C says: "Whenever I strike a direct trail on a subject *(and it's rarely that I fail to so strike a trail)* no other books are needed." This is a frequent comment. We have long asserted that when a point is annotated in L R A the resulting discussion is absolutely exhaustive on the subject. This has never been disproved.

You may have the opportunity to prove, or if you can, to disprove this proposition before buying. Write us for details, for a sample part, and for the new edition, brought down to date, of "Where to Look for the Law," a valuable hand book, out soon.

The Lawyers' Co-operative Publishing Company
Rochester New York